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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION ATHLETIC
GRANT-IN-AID CAP ANTITRUST
LITIGATION

MDL Docket No. 4:14-md-02541-CW

**DEFENDANTS' ADMINISTRATIVE MO-
TION CONCERNING USE OF PROTECT-
ED INFORMATION AT TRIAL**

Judge: Hon. Claudia Wilken

THIS DOCUMENT RELATES TO: ALL
ACTIONS EXCEPT *Jenkins v. Nat'l Col-
legiate Athletic Ass'n*, Case No. 14-cv-
02758-CW

Defendants respectfully move this Court for an order concerning the use at trial of highly confidential information, primarily concerning the media agreements between individual Defendants and their respective broadcast counterparties. Specifically, Defendants ask the Court to enter the same Order it entered in *O'Bannon* restricting sealable information, including the monetary terms of Defendants' media agreements, from being displayed or the subject of oral presentation, including testimony, in open court.

BACKGROUND

In January 2015, the parties to this suit negotiated, and the Court so ordered, a stipulated protective order concerning the use of confidential information. Dkt 189 ("Protective Order"). The Protective Order was modified several times following entry of the original order. Dkts. 234, 512, 539. The Stipulation and Order Regarding Second Addendum to Stipulated Protective Order ("Second Addendum") added a new provision limiting the involvement of defense counsel who receive "Network Strictly Confidential – Outside Litigation Counsel Only" ("NSC") information. Specifically, the Second Addendum provides:

[A]ny individual attorney who reviews Network Strictly Confidential – Outside Litigation Counsel Only Information of a Network Intervenor to which such attorney did not have access prior to production of such Information in this action may not, absent written permission from such Network Intervenor, participate directly or indirectly on or before March 31, 2021 in negotiating any media, network, or broadcasting contract, agreement, arrangement, or understanding with such Network Intervenor, except that nothing in this Addendum shall be construed to require a Network Intervenor's permission for any individual attorney's participation in negotiating any agreements, arrangements, or understandings pertaining to discovery, motion practice, or other litigation-related matters in this lawsuit pertaining to Network Strictly Confidential – Outside Litigation Counsel Only Information of a Network Intervenor.

Second Addendum, Dkt. 512 at ¶ 7(a).

Certain NSC information produced in this case has already been the subject of motions to seal. On July 9, 2018, the District Court referred all motions to seal pretrial material to Magistrate Judge Cousins. Dkt. 877. On August 10, the Magistrate Judge entered a series of orders on pending motions to seal pretrial material, denying them in part and granting them in part (collectively, the "Orders on Sealing Motions," Dkts. 959 through 964). Certain parties and non-parties filed objections to the Orders on Sealing Motions, Dkts. 978, 982-85, which are not yet resolved.

1 In preparation for trial, Defendants raised with Plaintiffs the need to reach agreement con-
 2 cerning the use of NSC information at trial, both with respect to information that has already been
 3 the subject of a motion to seal and information that has yet to be the subject of a motion to seal.
 4 See August 28, 2018 Declaration of Jennifer L. Jones (“Jones Decl.”), ¶ 2. At Plaintiffs’ request,
 5 Defendants provided a written proposal on August 25. Jones Decl., Ex. A at 3-5. Defendants’
 6 proposal was limited to information designated NSC and contemplates that (1) any document con-
 7 taining NSC information would be admitted under seal and not projected on the screen at trial;¹
 8 and (2) the parties would not solicit testimony regarding NSC information from witnesses and
 9 would advise them of the restrictions so that such NSC information is not volunteered. See *id.* at
 10 4.

11 The parties met and conferred concerning Defendants’ proposal on August 27. Jones Decl.
 12 ¶ 4. Plaintiffs refused to agree to restrict the use of sealable information at trial, either through *in*
 13 *camera* submission or by refraining from referring to sealable information during oral presenta-
 14 tion. Plaintiffs offered no counter-proposal.

15 Defendants now ask the Court to restrict use of NSC information consistent with the
 16 Court’s order issued in *O’Bannon* restricting the treatment of the same type of highly confidential
 17 information at trial.

18 ARGUMENT

19 I. The Court Should Protect Sealable Information from Disclosure at Trial.

20 Trial exhibits may be sealed for “compelling reasons.” *Kamakana v. City and Cnty. of*
 21 *Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 4:09-
 22 cv-03329-CW, Dkt. 201 (N.D. Cal. June 10, 2014). In the instant motion, Defendants seek to pro-
 23 tect from public disclosure at trial (1) information that the Magistrate Judge *has already concluded*
 24 meets the “compelling reasons” test in the Orders on Sealing Motions; and (2) on a provisional ba-
 25 sis, information that is the subject of an objection to the Magistrate Judge’s Orders on Sealing Mo-
 26

27
 28 ¹ This would not apply to any NSC information that Magistrate Judge Cousins has ruled is not en-
 titled to protection, except to the extent the information is the subject of a pending objection.

tions, that is the subject of a pending motion to seal, or that the disclosing party has not yet had the opportunity to move to seal. *See* Proposed Order, submitted concurrently herewith.

This is not the first time this Court has passed upon this issue. Defendants propose precisely the *same mechanism* that this Court ordered for protection of the *same type of information* in *O'Bannon*, where the Court issued the following order:

The parties shall refrain from referring to the sealable information contained in the conferences' licensing agreements and displaying any sealable information on the courtroom monitors during the trial.

Dkt. 201.²

Plaintiffs have forced a motion on this issue without any reasonable basis to distinguish the instant circumstances from those in *O'Bannon*, which Order was issued following a motion by the Big 12 Conference and Conference USA, defendants in this action, to seal information within their highly confidential media rights agreements and protect such information from disclosure at trial. Plaintiffs have simply argued, without any factual basis, that there are "different circumstances," and that it is "within the Court's purview of how she wants to manage the trial." Jones Decl. ¶ 6.

While Defendants agree that the Court is the final arbiter of the information disclosed at trial, no circumstances exist that warrant a deviation from the Court's treatment of this exact issue in *O'Bannon*. There are serious consequences to the disclosure of this sensitive information. In addition to the reasons supporting the Magistrate Judge's conclusion that there are "compelling reasons" to seal such information, counsel for some of the Defendants who regularly participate in the negotiation of licensing agreements with broadcasters will be prejudiced if NSC information is disclosed to them by virtue of restrictions in the Second Addendum to the Protective Order, ¶ 7(a), which would restrict their participation in future negotiations through 2021. Jones Decl. ¶ 7.

Indeed, given the burdens the Second Addendum imposes on defense counsel who receive NSC information and the possibility that, even if instructed not to disclose sealable information, witnesses may inadvertently reveal such information at trial, Defendants further request that the Court enter an order that, to the extent sealable NSC information is inadvertently revealed at trial

² Here, this should include not only the monetary terms of the relevant media agreements with the Network Intervenor, but also any specific terms taken from those agreements. *See* ECF No. 962, page 43, table lines 40a-b.

by any witness, defense counsel shall not, solely as a result of such disclosure, be barred from future negotiations under Paragraph 7(a)(2) of the Second Addendum.

CONCLUSION

For the foregoing reasons, the Court should enter an order requiring parties to refrain from referring to the sealable information or displaying any sealable information on the courtroom monitors during trial. Finally, Defendants ask that, to the extent any sealable information is inadvertently disclosed at trial, defense counsel be partially relieved of the operation of Second Addendum, ¶ 7(a)(2), as described above.

Dated: August 28, 2018

Respectfully submitted,

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8 **FILER'S ATTESTATION**

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12 /s/ Jennifer L. Jones
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